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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 AMERICAN FAMILY CONNECT
8 PROPERTY & CASUALTY INSURANCE
9 COMPANY,

Plaintiff(s),

10 v.

11 ROBERT M. WALTON,

12 Defendant(s).

Case No. 2:21-CV-174 JCM (BNW)

ORDER

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14 Presently before the court is defendant Robert Walton's motion to dismiss. (ECF No.
15 4). Plaintiff American Family Connect Property & Casualty Insurance Company
16 ("Connect") responded in opposition (ECF No. 6) to which Walton replied (ECF No. 7).

17 **I. BACKGROUND**

18 Walton was a passenger on an ATV when the driver lost control and the vehicle
19 rolled over. (ECF No. 4 at 2). Walton had three fingers on his dominant hand amputated
20 and incurred about \$96,000 in medical bills. (*Id.*). The driver and ATV were uninsured so
21 Walton made an uninsured motorist claim with his insurer Connect. (*Id.*). Walton's policy
22 has a \$100,000 underinsured/uninsured policy limit. (*Id.*).

23 Connect then brought this declaratory relief action, seeking a coverage determination
24 that Walton's accident is not covered by his policy. (Compl., ECF No. 1 ¶ 19). Its complaint
25 perfunctorily declares that the amount in controversy exceeds \$75,000. (*Id.* ¶ 3). And before
26 bringing this action, Connect paid Walton \$25,000 under the policy. (ECF No. 4 at 2; ECF
27 No. 6 at 2). Walton says he has incurred no property damage, no towing expense, and no
28 rental car expense and that the policy's medical payments provision is not in dispute. (ECF

1 No. 4 at 3). Thus, Connect has no other potential exposure other than the remaining \$75,000
2 of the policy limit; this \$75,000 sum is the only recovery that Walton is seeking. (*Id.*).

3 Walton now moves to dismiss under Rule 12(b)(1) for lack of subject matter
4 jurisdiction, arguing that the amount in controversy does not exceed \$75,000. (*Id.*).

5 **II. LEGAL STANDARD**

6 Dismissal under Federal Rule of Civil Procedure 12(b)(1) is proper if the complaint
7 fails to allege sufficient facts to establish subject matter jurisdiction. *In re Dynamic Random*
8 *Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 984–85 (9th Cir. 2008). The
9 party invoking the court’s jurisdiction bears the burden to show that the case is properly in
10 federal court. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001). If the court
11 determines it lacks subject matter jurisdiction, it “must dismiss the complaint in its entirety.”
12 *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

13 A Rule 12(b)(1) motion to dismiss can be factual or facial. “A facial attack is based
14 on the failure of the allegations of the complaint to establish subject matter jurisdiction while
15 a factual attack is based on . . . extrinsic evidence which establishes that the court does not
16 have subject matter jurisdiction.” *China Nat. Metal Prod. Imp./Exp. Co. v. Apex Digit., Inc.*,
17 155 F. Supp. 2d 1174, 1177–78 (C.D. Cal. 2001). But it is improper to rule on a Rule
18 12(b)(1) motion when the “jurisdictional issue and the substantive issues . . . are so
19 intertwined that the question of jurisdiction is dependent on the resolution of factual issues
20 going to the merits.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1040 (9th Cir. 2004).

21 The court has subject matter jurisdiction when there is complete diversity of
22 citizenship and the amount in controversy “exceeds the sum or value of \$75,000, exclusive of
23 interest and costs.” 28 U.S.C § 1332(a)(1). When the case is originally brought in federal
24 court, the amount in controversy alleged in the complaint controls so long as it is made in
25 good faith. *Crum v. Circus Circus Enterprises*, 231 F.3d 1129, 1131 (9th Cir. 2000). “It
26 must appear to a *legal certainty* that the claim is really for less than the jurisdictional amount
27 to justify dismissal.” *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)
28 (emphasis added).

1 **III. DISCUSSION**

2 In opposing dismissal, Connect’s sole contention is that “ ‘it is long-established that
3 in declaratory judgment actions about whether an insurance policy is in effect or has been
4 terminated, the policy’s face amount is the measure of the amount in controversy.’ ” (ECF
5 No. 6 at 3 (quoting *Elhouty v. Lincoln Benefit Life Co.*, 886 F.3d 752, 756 (9th Cir. 2018))).
6 The policy’s face amount is \$100,000 which confers subject matter jurisdiction. In other
7 words, Connect invokes the court’s jurisdiction and starts and ends with the policy’s face
8 amount.

9 But as Walton points out, *Elhouty* does not control here. (ECF No. 7 at 2). *Elhouty*
10 “was a *validity* case, not a *value* case.” (*Id.* (emphasis in original)). It only considered
11 whether a life insurance policy had lapsed; whether the insurer or insured owed any money
12 was not at issue like it is here. (*Id.*). *Elhouty* offered a pertinent example to explain its
13 holding: “[I]f the issue is whether certain installments should be paid under a disability
14 policy, the policy’s face amount does *not* establish [the amount in controversy]. Rather, the
15 value of the object of the litigation is the amount of the unpaid installments allegedly due.”
16 *Elhouty*, 886 F.3d at 755 (emphasis added) (internal quotation marks and citation omitted).

17 Walton also cites *Budget Rent-A-Car, Inc. v. Higashiguchi* where the Ninth Circuit
18 examined a rental car liability policy and held that “Budget’s maximum liability under the
19 [r]ental [a]greement is relevant to determining the amount in controversy *only if* the validity
20 of the entire insurance policy is at issue, or if the value of the underlying tort claims exceeds
21 the liability ceiling. Because the applicability of Budget’s liability coverage to a particular
22 occurrence is at issue, the amount in controversy is the value of the underlying potential tort
23 action.” 109 F.3d 1471, 1473 (9th Cir. 1997) (emphasis added).

24 Given this Ninth Circuit caselaw, the validity of Walton’s *entire* insurance policy is
25 not at issue.¹ This is not a dispute over whether his policy “is in effect or has been

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27 ¹ Cf. *Progressive N. Ins. Co. v. Pena-Guzman*, No. 2:17-cv-02803-GMN-PAL, 2019
28 WL 1386377, at *2 (D. Nev. Mar. 26, 2019) (dismissing a case with \$15,000 per person and
 \$30,000 per accident policy limits because it was not clear that “Progressive’s declaratory
 relief claim is limited to the underlying accident and not the policy as a whole”).

1 terminated.” *Elhouty*, 886 F.3d at 756. Thus, the policy’s \$100,000 face amount is not the
2 amount in controversy. This is a dispute over whether a “particular occurrence”—Walton’s
3 ATV accident—is covered so the amount in controversy is the “value of the underlying
4 potential tort action.” *Higashiguchi*, 109 F.3d at 1473; *see also* (Compl., ECF No. 1 ¶ 12
5 (“The Insurance Policy only applies to the extent that there is a claim by the Defendant that
6 is covered by the Uninsured Motorist portion Insurance Policy.”)).

7 To that end, Connect does not dispute that before bringing this action, it “paid the
8 \$25,000 undisputed portion of the \$100,000 policy, has made no demand for return of that
9 amount, and has not alleged in its [c]omplaint that the \$25,000 remains in controversy.”
10 (ECF No. 4 at 2; *see also* ECF No. 6 at 2). It also does not dispute Walton’s contention that
11 it “has no other potential exposure” beyond the policy limit. (*Id.*). Thus, given the \$100,000
12 policy limit and Connect’s \$25,000 pre-suit payment, the amount in controversy is exactly
13 \$75,000, “one penny short” of the jurisdictional requirement. *Freeland v. Liberty Mut. Fire*
14 *Ins. Co.*, 632 F.3d 250, 253 (6th Cir. 2011) (vacating judgment for lack of subject matter
15 jurisdiction when the insurer conceded the policy required a \$25,000 payment but disagreed
16 that the insured was entitled to \$100,000 in coverage); *see also Schubert v. Auto Owners Ins.*
17 *Co.*, 649 F.3d 817, 821–22 (8th Cir. 2011) (discussing amount in controversy and insurer
18 pre-suit payments). In short, “if Walton prevails, he will receive, and Connect will pay” him
19 not \$100,000 but \$75,000 which means the court does not have subject matter jurisdiction.
20 (ECF No. 6 at 3).

21 **IV. CONCLUSION**

22 Accordingly,

23 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Walton’s motion to
24 dismiss (ECF No. 4) be, and the same hereby is, GRANTED. This case is DISMISSED
25 without prejudice for lack of subject matter jurisdiction.

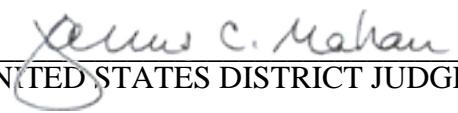
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The clerk shall close the case.
DATED May 13, 2021.


UNITED STATES DISTRICT JUDGE